

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 71925-41B BY RONALD W. JOHNSON)

* * * * *

The Proposal for Decision in this matter was issued and served on all parties on December 4, 1990. The Hearing Examiner proposed that Beneficial Water Use Permit No. 71925-41B be granted to Applicant with conditions. Exceptions to the Proposal for Decision were received by the Department of Natural Resources and Conservation (Department) from Ted J. Doney, attorney for Applicant, and John C. Chaffin, attorney for Objector United States of America, Department of the Interior, Bureau of Reclamation (USA).

1. Administrative Rule of Montana 36.12.229 provides that parties have twenty days from the date of service of a Proposal for Decision to file exceptions; ARM 36.12.209 provides that service by mail is complete upon postmarking. Page 22 of the Proposal for Decision in this matter specifically and distinctly notified all parties of the procedure for filing exceptions. Twenty days from the date of issuance of the Proposal For Decision in this matter, December 4, 1990, was December 24, 1990, therefore the deadline for filing exceptions in this matter was December 24, 1990. The postmark on the envelope in which exceptions filed by Objector USA were received is dated December 31,

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1990, therefore the exceptions filed by Objector USA were not timely and are stricken. See In re Application No. 70584-g41B by Petersen Livestock; In re Applications Nos. 69639-s76H by Unified Industries and 69659-s76H by City of Pinesdale.

2. Applicant requested oral arguments be held on his Exception. An oral argument hearing was held March 28, 1991, in Helena, Montana, before John E. Stults, Department Hearings Officer. Present at the hearing were: John Stults; Faye Bergan, Department Legal Counsel; Applicant Ron Johnson; Ted Doney; and Jim Beck, Agriculture Specialist with the Department's Helena Water Resources Regional Office.

On March 26, 1991, the Department received a Written Argument in Lieu of Oral Argument on the Exceptions to Proposal for Decision from Objector USA. At the oral argument hearing, Applicant moved that Objector USA's arguments not be considered by the Department in reaching its final decision in this matter as they do not pertain to the issues raised by timely exceptions to the Proposal for Decision. The motion was granted, and arguments at the hearing were restricted to the scope of the timely exceptions.

3. Applicant excepts to Conclusion of Law 5, specifically the last two sentences, and paragraph B of the Proposed Order, specifically the first three sentences. Applicant argues: (1) the Department has no authority to enforce such a requirement through a water use permit; and (2) even if the Department does have such authority, there is no evidence in the record that

contamination of the groundwater will occur or that the well will be constructed with a leaky casing, pipe, fitting, valve, or pump prohibited by the statute and therefore the requirement cannot apply.

It appears the Hearing Examiner presumes the commingling of waters proposed by Applicant would result in contamination of the groundwater aquifer that is the proposed source. While this may well be a valid presumption, it is not substantiated by evidence in the record. The conclusions of law in agency decisions must be based on substantial credible evidence in the record or properly noticed by the hearing examiner, usually as stated in the examiner's findings of fact. See Mont Code Ann. § 2-4-623(2) and (3) (1977); see also Mont. Code Ann. § 85-2-311(1) and (4); Mont. Admin. R. 36.12.226(2) (1984). After a thorough review of the record and Proposal in this matter, it has been determined that the record contains no evidence relating to the quality of the water Applicant proposes to divert into the proposed well. Furthermore, there is no indication in the record or the Proposal that the Hearing Examiner took notice of facts or materials relating to the quality of said water. This being so, insufficient foundation exists for the conclusion reached and for the prohibition imposed in the Proposal for Decision. Therefore, Conclusion of Law 5 is hereby revised as follows:

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 4, 5, and 6. Applicant is hereby urged to make himself aware of the regulations in place to prevent the contamination of groundwater, and to

determine with as much specificity and certainty as possible whether the proposed use of his well as a sump for Downing Spring water is safe and complies with the pertinent regulations. See Finding of Fact 7.

In addition, sentences two and three in Paragraph B of the Proposed Order are hereby deleted, i.e., the language forbidding Permittee from using the well as a sump.

The issue of the Department's authority to impose the prohibition against using the proposed well as a sump for surface water diverted from Downing Spring need not be reached as the prohibition has been removed from the conditions in the final order granting the permit.

The commingling of surface water and groundwater in the well casing as Applicant proposes to do, creates the possibility of groundwater contamination, although no evidence is contained on the record as to this issue. Applicant has the responsibility to avoid causing groundwater contamination. If the contamination of groundwater occurs, it would be a violation of the provisions of § 85-2-505 and § 75-5-101, et. seq., MCA, and ARM 16.20.1001, et seq., and Applicant could be subject to civil or criminal penalties for the violations.

4. Removing the prohibition against diverting Downing Spring water into the well casing means that the physical structures and periods of operation of the diversion system will be such that Paragraphs C and D as stated in the Proposed Order would not fulfill their purposes. These conditions are intended to ensure that the amounts of water diverted through the proposed

system are within the limits of Applicant's water rights, and to provide data on the groundwater source for future assessment of impacts from or to this appropriation, should such an assessment be needed.

During the oral arguments, Applicant stated that he would have no objection to a rewriting of these conditions so that they accomplish their intended purpose under the system likely to be operated by Applicant. Therefore, Paragraph C has been revised to require that adequate measuring devices be installed on the diversion system to accurately measure the flows and volumes of water diverted through it from the various sources, and Paragraph D has been revised to make it clear that measurements of static water level in the well must be taken twice each year, before the system is first used and after the system is last used to appropriate water from either source.

5. At the Oral Argument hearing, Applicant indicated a willingness to accept placing a condition on the permit that requires a valve be placed in the system that can be operated to prevent Downing Spring water from entering the well casing unless the pump is turned on, and prohibiting the Permittee from allowing Downing Spring water to enter the well casing unless the pump is turned on. Such a condition should also require that the system be operated to ensure that all water from Downing Spring is used through the irrigation system so that water diverted into the well from Downing Spring does not go toward aquifer recharge

rather than to the beneficial use to which Applicant has a water right. Therefore, new Paragraph E has been added to the Order.

Upon review of the evidence herein and consideration of the exceptions, the Findings of Fact and Conclusions of Law in the Proposal for Decision as revised above are hereby adopted by the Department.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 71925-41B is hereby granted to Ronald W. Johnson to appropriate groundwater at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, Township 7 South, Range 9 West, Beaverhead County, by means of a well. The water shall be pumped at a rate not to exceed 1200 gallons per minute up to 506 acre-feet per year for supplemental irrigation purposes on 209 acres from April 15 to September 15, inclusive of each year. The water shall be used on 10 acres in the S $\frac{1}{4}$ S $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 29, 153 acres in the NE $\frac{1}{4}$ and 31 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 32, and 15 acres in the W $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 33, all in Township 7 South, Range 9 West, in Beaverhead County.

A. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize

appropriations by the Permittee to the detriment of any prior appropriator.

B. This permit is subject to § 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use. The final completion of this well must include an access port of at least .50 inch so the static water level in the well may be accurately measured.

C. The Permittee shall install an adequate flow metering device in the delivery line from the well to the sprinklers in order to allow the combined or total flow rate and volume of water from either source that has been pumped from the well to be accurately measured and recorded. The Permittee shall also install another flow metering device in order to allow the flow of Jones/Downing Spring water (Claimed Water Right No. W142919-41B) diverted into the well casing to be measured and recorded. Flow rate and volume recordings shall be made at both measuring devices whenever diversions from Jones/Downing Spring into the well casing begin or cease.

If the measuring device on the Jones/Downing Springs to well casing conveyance is not of the continuous reading type, weekly flow measurements shall be made and recorded, and the time of diversion shall be recorded. These measurements are in addition to the measurements required by the preceding paragraph.

The Permittee shall keep a written record of the flow rate and volume of all water diverted through both lines, including the period of time, and shall submit said records to the Helena Water Resources Regional Office upon demand and no later than November 30 of each year.

D. The Permittee shall take static water level measurements of the well at least twice each year: 1) on April 1 before operating the system for the first time, and 2) on November 15 after the system has been out of operation for the season. The Permittee shall keep a written record of these measurements and submit them to the Helena Water Resources Regional Office, 1520 E. 6th Ave., Helena, MT 59620-2301, upon demand and no later than November 30 of each year.

E. Permittee may not divert water from the Downing Spring sump into this well casing unless the pump in the well is operating. When water from the Downing Spring sump has been diverted into this well, Permittee may not cease pumping from the well until water has stopped being diverted into the well casing from the Downing Spring sump and the volume of water diverted into the well casing from the Downing Spring sump has been pumped out of the well casing, as measured by the devices in Condition C.

F. This permit is issued in conjunction with Water Use Permit No. 60490-41B. The combined appropriation as granted shall not exceed a total of 2400 gallons per minute up to 506 acre-feet per year.

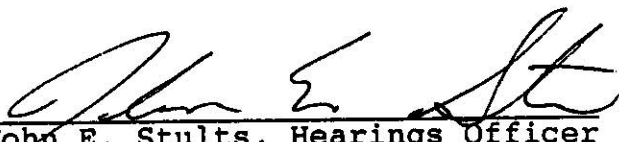
G. This permit is issued in association with Water Right Claims No. W142919-41B, W142920-41B, W142922-41B, and W142923-41B. The total amount of water diverted for this acreage shall not exceed that amount which has been claimed and can be beneficially used.

H. Issuance of this Permit shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing the Permit, acknowledge any liability for damages caused by the exercise hereof even if such damages are a necessary and unavoidable consequence of same.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 21ST day of June, 1991.


John E. Stults, Hearings Officer
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406)444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record

at their address or addresses this 24th day of June, 1991 as follows:

Ronald W. Johnson
Box 791
Dillon, MT 59725

Tash T. Diamond Livestock,
Inc.
1200 Hwy 278
Dillon, MT 59725

Carol & Thomas Peterson
John & Melissa Peterson
P.O. Box 127
Wilsall, MT 59086

Aileen O. Peterson
1325 Hwy 278
Dillon, MT 59725

John Chaffin
Office of the Solicitor
U.S. Department of Interior
Bureau of Reclamation
P.O. Box 31394
Billings, MT 59107-1394

Richard Kennedy, Manager
East Bench Irrigation Dist.
Clark Canyon Water Supply
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Holly J. Franz
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Cindy G. Campbell
Hearings Unit Legal Secretary

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**BEFORE THE DEPARTMENT OF
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OF THE STATE OF MONTANA**

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 71925-41B BY RONALD W. JOHNSON)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on August 30, 1990, in Dillon, Montana.

Applicant Ronald W. Johnson appeared at the hearing in person and by and through counsel, Ted J. Doney.

Objectors Neal and Jamie Davis appeared at the hearing pro se.

Objector Tash T. Diamond Livestock, Inc., hereafter Objector Tash, appeared by and through William T. Tash.

Objectors Carol and Thomas D. Peterson and Aileen Peterson appeared at the hearing in person and by and through William T. Tash.

Objectors John R. and Melissa Peterson appeared by and through William T. Tash.

Objector Donald P. Harrington appeared in person and by and through counsel J. Blaine Anderson, Jr.

Objectors East Bench Irrigation District, hereafter East Bench, and Clark Canyon Water Supply Co., hereafter Clark Canyon, appeared by and through Richard H. Kennedy, Mgr.

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Objector U. S. Department of Interior, Bureau of Reclamation, hereafter Bureau, appeared by and through counsel Gerald R. Moore.

David E. Nelson, Hydraulic Engineer with the Bureau, appeared as an expert witness for the Bureau.

Objector Montana Power Company did not appear at the hearing and had contacted the Hearing Examiner by telephone on August 27, 1990, stating that it was withdrawing its objection to this Application. A written withdrawal was submitted by Holly Franz, Attorney for Montana Power Company, on August 31, 1990.

William Uthman, Hydrogeologist with the Department of Natural Resources and Conservation, hereafter Department, appeared at the hearing as a staff expert witness.

Jim Beck, Agricultural Specialist with the Department, appeared as a staff expert witness.

EXHIBITS

Applicant's Exhibit 1 is a hand-drawn map of the north half of Sections 32 and 33 and a portion of the south half of Sections 28 and 29, Township 7 South, Range 9 West. The green area on the map is the proposed place of use. The pink lines are water delivery lines. The production well is designated by the word "well" and an arrow in blue in said Section 33. This exhibit was entered into the record without objection.

Applicant's Exhibit 2 is a copy of Water Right Decree No. 1449, Beaverhead County. Objector Tash objected to this exhibit as proof of ownership. Applicant did not enter exhibit as proof

of ownership, but as proof of a water right. Objection overruled.

Objector Davis' Exhibit 1 is a copy of Certificate of Water Right No. 65292-g41B issued to Neal and Jamie Davis.

Objector Davis' Exhibit 2 is a document entitled "Davis Well Measurements." It has measurements taken on three different years, the depth to the water, and the depth of water in the well.

Objector Davis' Exhibit 3 is a July, 1990, photograph showing the Applicant's sprinkler in action.

Objector Davis' Exhibit 4 is a August, 1987, photograph taken in August of 1987 of trees on the Davis property.

Objector Davis' Exhibit 5 is a September, 1988, photograph of the same trees shown in Objector Davis' Exhibit 4.

Objector Davis' Exhibit 6 is a July, 1990, photograph of the same trees shown in Objector Davis' Exhibits 4 and 5. The last three Exhibits were offered as proof the Davis' trees are dying.

All of Objectors Davis' exhibits were entered into the record without objection.

Department's Exhibit 1 is a copy of a step - drawdown graph for the Applicant's well.

Department's Exhibit 2 is a copy of a distance - drawdown graph for the Applicant's well.

These exhibits were mistakenly labeled "Sullivan" well.

Department's exhibits were entered into the record without objection.

The Department file was reviewed by all parties and was accepted into the record without objection.

PRELIMINARY MATTERS

1. At the beginning of the hearing, Applicant made a motion to incorporate the record of the proceedings In the Matter of Application for Beneficial Water Use Permit No. 74154-41B by Frederick L. Johnson held on August 29, 1990. There being no objections, it was granted. Objector Harrington requested the record of the instant case remain open for 30 days to review the record In re Frederick Johnson and submit further evidence if necessary with an additional 10 days for Applicant to counter that evidence. The request was granted. Objector Harrington did not submit further evidence.

2. During the hearing the Bureau attempted to call David E. Nelson as an expert witness. Counsel for the Applicant objected and argued that the Bureau had not responded to Applicant's discovery request in a timely manner according to the Department's Procedural Rules. The Bureau argued that according to the Montana Rules of Civil Procedure, they had responded well within the time allowed. Since the Department's Procedural Rules supersede the Montana Rules of Civil Procedure¹ in this instance,

¹The rules of Civil Procedure may apply where specifically referenced by the water right contested case rules, but are otherwise inapplicable. Rules 5(b) and 6(e) are not referenced by the rules governing these proceedings and therefore are not applicable. See In re Application No. 70584-41B by Petersen Livestock, Final Order.

the Hearing Examiner sustained the Applicant's objection and Mr. Nelson was not allowed to testify.

On September 7, 1990, the Hearing Examiner received a motion and supporting brief to reopen the record to receive additional testimony. The Bureau had discovered that Applicant's Request for Discovery had been delayed because it had been sent to an incorrect address.

The record was not closed after this hearing. It had been left open until September 30, 1990. Since this motion was received before the record closed, there was no need to reopen.

The Hearing Examiner conducted a telephone conference with the Applicant's counsel and the Bureau's counsel on September 20, 1990. An agreement was reached that Mr. Nelson's testimony would be allowed in a written report form. Said testimony would be submitted to the Hearing Examiner no later than October 20, 1990. The Applicant would then submit to the Hearing Examiner a written response to the written testimony within 10 days after his receipt of said testimony. The Bureau would then submit written rebuttal to the Hearing Examiner within 10 days of its receipt of the response. The written testimony of David E. Nelson was received by the Department on October 22, 1990, postmarked October 19, 1990. The written response from Applicant's counsel was received on November 1, 1990, postmarked October 31, 1990. The written rebuttal was received on November 13, 1990, postmarked November 9, 1990.

The Bureau also stated that the Department had used an incorrect address on its Certificate of Service in the Notice of Hearing. The Bureau went on to state that the Office of the Solicitor is a separate and distinct agency from the Bureau and listed the address for the Office of Solicitor. The Objection to Application filed by the Bureau gave the Bureau's address. Objections to Application submitted in response to Public Notices are the sources for the addresses in the Department's Certificates of Service. If the Bureau wants the Department to send correspondence to the Office of the Solicitor, the Bureau should so state in its objection.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department."

2. Ronald W. Johnson filed the above-entitled Application with the Department on June 6, 1989, at 9:45 a.m.

3. Pertinent portions of the Application were published in the Dillon Tribune, a newspaper of general circulation in the area of the source, on April 3, 1990.

4. The Applicant proposes to appropriate groundwater at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, Township 7 South, Range 9 West, Beaverhead County, by means of a well. The water would be pumped at a rate of 1200 gallons per minute (gpm) up to 506 acre-

feet per year for supplemental irrigation purposes on 209 acres from April 15 to September 15, inclusive of each year. The proposed places of use are 10 acres in the S $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 29, 153 acres in the NE $\frac{1}{4}$ and 31 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 32, and 15 acres in the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 33, all in Township 7 South, Range 9 West, in Beaverhead County, all owned by Frederick Johnson and the Applicant. (Department file.)

5. This appropriation would be used in association with Statements of Claim No. 41B-W142919, 41B-W142920, 41B-W142922, and 41B-W142923. It would also be used in conjunction with Permit to Appropriate Water No. 60490-41B. Statement of Claim No. 41B-W142919 claims the use of 150 miner's inches up to 368 acre-feet per year from Jones Spring, also known as Downing Spring. (This spring was referred to as Downing Spring by all parties at the hearing, therefore will be called Downing Spring in this Proposal for Decision.) Statement of Claim No. 41B-W142920 claims 50 miner's inches up to 525 acre-feet per year from Rattlesnake Creek. Statement of Claim No. 41B-W142922 claims 100 miner's inches up to 66.6 acre-feet per year from Kelly Reservoir on Rattlesnake Creek. Statement of Claim No. 41B-W142923 claims 150 miner's inches up to 75 acre-feet per year from Essler Reservoir on Rattlesnake Creek. Permit No. 60490-41B authorizes the Applicant to appropriate 1,200 gpm up to 260 acre-feet per year of groundwater by means of a well. All of the aforementioned water rights have some places of use that overlap some parts of the proposed place of use, with the exception of

Statement of Claim No. 41B-W142919 which is used on the same acreage as the proposed place of use.

6. The proposed production well was completed on October 20, 1989. The well is 112 feet deep with 20 inch casing which is perforated from 22 to 90 feet. Bedrock was encountered at 103 feet. The driller continued into the bedrock for 9 feet prior to completing the well. A 125 horsepower pump would be set at 88 feet in the well. Water would be pumped into a buried pipeline which would supply a center pivot, wheel line, and hand-line sprinkler systems. The pipeline would be 12 inches in diameter at the well head then would narrow to 10 inches in diameter up to the location of the "slam valve" which would separate this system from another², then the pipe would narrow to 8 inches in diameter to supply the proposed system. (Testimony of Applicant and Department's file.)

7. The Applicant proposes to use the well as a sump at certain times. Downing Spring does not have a good flow until late June or early July. In the spring from April 15 until Downing Spring begins to flow, the well would be used to appropriate groundwater. After Downing Spring begins to flow, the water from the spring would be carried to the well by a drain ditch, then the water would flow into the well casing. The well water would be used only to supplement the flow of Downing Spring when needed. If Downing Spring were to cease flowing as it has

²See In re Application No. 74154-41B by Frederick L. Johnson.

in the past when the upgradient irrigators did not use water for a few years, the well would be used to pump groundwater throughout the irrigation season.

8. Applicant has kept records of the static water level in the Johnson test well, also known as the Unruh well, since 1978. This well is located approximately one-third of a mile from the production well for the proposed project. According to these measurements, the static water level in the area has fluctuated between eight feet six inches and six feet two inches. •

(Applicant's Exhibit 2 In re Frederick Johnson and Applicant's Exhibit 1.)

9. The aquifers in the Rattlesnake Creek area are generally hydrologically connected. An aquifer test was performed on the Frederick Johnson well which is located approximately one-third mile from Applicant's proposed production well. The results of this test indicate a semi-confined aquifer with the confinement believed to be localized and discontinuous. (Testimony of William Uthman and David Nelson.)

10. The Applicant performed a step-drawdown test on the production well. After pumping the well at a rate of 1305 gpm for 24 hours, the drawdown was 26 feet. The discharge was increased by 100 gpm (to 1405 gpm) at 24 hours, and after pumping at this rate for an additional 24 hours, the drawdown was 32 feet. The discharge then was increased an additional 75 gpm (to 1480 gpm) at 48 hours, and after pumping at this rate for an additional 24 hours, the drawdown was 41 feet. Using this

information, it was possible to derive approximate aquifer hydraulic properties, such as a transmissivity of 70,300 gallons per day. The storage coefficient could not be derived from the data collected by the Applicant. Thus a value of 0.0039 was assumed as a reasonable estimate for the storage coefficient.

Using the above information, Mr. Uthman produced a distance-drawdown graph. (Department's Exhibit 2.) Under the worst case scenario and assuming the objector's wells are finished in the same aquifer as the Applicant's well, continuous pumping at 1200 gpm for 95.4 days would create a drawdown effect of seven feet in the Tash well, seven and one-half feet in the Peterson well, seven and one-half feet in the Davis well, and four and one-half feet in the Harrington well. However, it is unreasonable to assume that the Applicant would pump the well continuously for 95.4 days. Intermittent pumping would not have the same effect as continuous pumping because the static water level would recover to the prepumping level following each pumping cycle. Still under the worst case scenario, continuous pumping for 15 days at 1200 gpm would create a drawdown ranging from five feet at the Davis well to two feet at the Harrington well.

Distance-drawdown graph predictions are accurate only when the assumptions under which they were generated are true. Some of the assumptions will most likely be violated. The first assumption that will be violated is that the drawdown cone of depression never reaches equilibrium. The cone of depression will reach equilibrium probably within 12 to 18 hours and

drawdown will never reach the objector's wells. The second assumption to be violated is that no recharge reaches the cone of depression. Natural recharge in the form of rainfall, snowmelt or possibly induced seepage through the underlying bedrock fractures does occur. The effect is to attenuate or eliminate drawdown. The actual drawdown will be measurably less than the drawdown predicted by the distance-drawdown graph. In practice, there will be imperceptible drawdown on the objector's wells. (Department's Exhibit 2 and testimony of William Uthman.)

11. There is virtually no potential for groundwater - surface water interaction. Rattlesnake Creek and nearby drainage ditches barely penetrate the shallow aquifer and do not penetrate the deeper aquifer to establish a hydraulic connection. (Testimony of William Uthman.)

William Uthman and David Nelson agree there would be a diminishment in baseflow accretions, however this diminishment would be imperceptible. It is most likely that water availability problems are more attributable to drought effects and lack of recharge than to decreased baseflow accretions. (Testimony of William Uthman, David Nelson and Department file.)

12. Objector Harrington has two wells approximately three-quarters of a mile from the proposed point of diversion. When he purchased the property, the domestic well was 21 feet deep and the livestock well was 30 feet deep. Both wells had been completed several decades ago. In the spring of 1988, Mr. Harrington had to deepen those wells approximately 40 additional

feet. (This statement corrects the Objection to Application submitted by Objector Harrington stating the wells were deepened in 1989.) Mr. Harrington believes the proposed project will lower the water level, perhaps causing his wells to fail. (Testimony of Objector Harrington and Department file.)

13. It is difficult to establish the reasons for well failures. Screens and perforations sometimes become clogged, pumps may fail, and groundwater levels temporarily decline during drought cycles. The life of a well is generally 15 to 30 years. (Testimony of William Uthman.)

14. Objectors Davis have Certificate of Water Right No. 65292-41B for a domestic well located approximately three quarters of a mile from Applicant's production well. The static water level of this well has been measured by Mr. Davis on only three different occasions in the last four years. According to these measurements the static water level in this well has declined approximately five feet since 1987. (Davis' Exhibits 1 and 2 from the record In re Frederick Johnson.)

Mr. Davis testified during the hearing In re Frederick Johnson that their trees are dying and that the County Extension Agent attributed the loss to lack of water. Objectors Davis believe the trees are dying because the water level in the aquifer is diminishing, largely due to the number of irrigation wells developed in this area. Mr. Davis confirmed this objection during the hearing of the instant case. (Testimony of Neal and Jamie Davis and Davis' Exhibits 1 through 6.)

15. Objector Tash has nine Water Right Claims before the Water Court. Three of the Claims are for water use from Van Camp Spring also known as Jones Spring or Downing Spring and one is for water use from a slough which captures waste water from Van Camp Spring. The remaining Water Right Claims are for surface water: three claim water from the Beaverhead River, one claims water from Van Camp Slough, and one claims water from Dory Creek. (Department records.)

Objector Tash introduced a photograph of an area he called Rattlesnake Slough during the hearing In re Frederick Johnson. The slough was dry except for a small puddle beyond the animal tracks. Mr. Tash stated Rattlesnake Slough had been dry only one other time to his knowledge and that was during the pumping and discharging of water from the Allred Pit. This year there was no water in the slough except what Mr. Tash had ordered from his river allotment. (Testimony of William Tash during the hearing In re Frederick Johnson.)

Mr. Tash testified during the hearing in the instant case that his objection was based on continuing adverse effect to senior claims of both surface and groundwater sources and that even though the effect of groundwater use on the surface water sources would be unquantifiable, he was able to quantify his loss in terms of production loss.

16. The Bureau has filed 11 Water Right Claims for surface water from the Beaverhead River. Three of the Water Right Claims are for Clark Canyon Reservoir and four are for wells. It also

has one Beneficial Water Use Permit for use of Beaverhead River water and five Water Right Certificates for groundwater use. All of the wells are located at least three miles from Applicant's well (Section 17, Township 8 South, Range 9 West), many of them a much greater distance (Section 10, Township 10 South, Range 10 West). (Department file.)

17. Neither East Bench nor Clark Canyon have filed Water Right Claims. However, Water Right Claim No. W040850-41B filed by the Bureau indicates this Claim is for the East Bench water use. The Bureau's Water Right Claim No. W040854-41B indicates this Claim is for Clark Canyon's water use. (Department Records.)

18. There has been a shortage of water in Clark Canyon Reservoir for the last three years. When there is insufficient water to fulfill all the contracts, Clark Canyon receives its water first, then East Bench is allocated the rest of the water available for irrigation. The historic delivery of water to the irrigator has been two acre-feet per acre for class one and two lands and two and one half acre-feet per acre for class three lands. Additional water, if available, could be purchased.

In 1990, there were 2,500 acres under the East Bench project that could not be irrigated due to the water shortage. Some of the water users had to stop irrigating on the first of July. Mr. Kennedy estimates a \$2,000,000 loss for East Bench and a \$1,000,000 loss for Clark Canyon.

At the present time, the inflow to the reservoir is down from previous years. The Bureau, Clark Canyon, and East Bench have not objected to additional water use above the dam because a Bureau study determined there was enough water to irrigate 15 percent more land than was actually under irrigation without adversely affecting the Project. However, they probably would object to additional upstream water use at this time. There have been no recent applications for upstream use of the Beaverhead River. While the Johnson well is not responsible for the decreased inflow, Mr. Kennedy believes the irrigation wells in the area are reducing baseflow accretions because no one has identified the boundaries of the lower aquifer nor has it been established there is a barrier separating the aquifer and the Beaverhead River. (Testimony of Richard Kennedy.)

19. The Rattlesnake Creek area has been experiencing drought conditions for the last several years. There is no doubt the drought is the reason there is a shortage of water. (Testimony of Objector Harrington, Dick Kennedy and testimony of William Tash during the hearing In re Frederick Johnson.)

20. Department records reveal no planned uses or developments for which a permit has been issued, nor any planned uses or developments for which water has been reserved, that may be adversely affected by the proposed project.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore, the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto. Title 85, Chapter 2, Part 3, MCA.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1), MCA, are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

....
(4) To meet the substantial credible evidence standard in this section, the applicant shall submit independent hydrologic or other evidence, including water supply data, field reports, and

other information developed by the department, the U.S. geological survey, or the U.S. soil conservation service and other specific field studies, demonstrating that the criteria are met.

4. The proposed use, irrigation, is a beneficial use of water. See § 85-2-102(2), MCA.

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate as constructed. See Findings of Fact 4, 5, and 6. However, if the Applicant modifies the well construction to allow the waters of Downing Spring to enter the casing, the well construction would be in violation of § 85-2-505, MCA, which requires all wells to be constructed and maintained as to prevent contamination or pollution of groundwater. The Applicant must not modify the well construction as proposed. See Finding of Fact 7.

6. The Applicant has possessory interest in the proposed place of use. See Finding of Fact 4.

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 20.

8. There are unappropriated waters in the source of supply at the proposed point of diversion, at times when the Applicant proposes to put those waters to beneficial use. The water is available in the amount requested throughout the proposed period of use. See Findings of Fact 8, 9, and 10.

9. There is substantial credible evidence that the water rights of prior appropriators will not be adversely affected. See Findings of Fact 9, 10, and 11.

Objectors Clark Canyon, East Bench and the Bureau presented evidence that they have not been able to fulfill all their obligations in the last few years due to a shortage of water. However, there is evidence the inflow to the reservoir is down from previous years See Finding of Fact 16, 17, and 18.

Although groundwater and surface water are interconnected, both expert witnesses agree the loss of baseflow accretion to the Beaverhead River would be imperceptible. See Finding of Fact 11. Mere diminution does not, in itself, create adverse effect. See In re Application No. 33484-g40A by Hunt.

Objectors Davis presented evidence during the hearing In re Frederick Johnson that the water level in their well had declined. See Finding of Fact 14. However, the record includes only three static water levels in the last four years and does not indicate whether the pump was active before or during the measuring process or if the pump had been idle for a period of time before the measurements. Measurements taken while the pump is in operation or immediately after the pump stops, will be inaccurate. The Davis well would experience no adverse effect as a result of pumping the proposed production well. See Finding of Fact 10.

Objector Harrington had problems with two of his wells in 1988. See Finding of Fact 12. It is difficult to determine the

exact cause of the failure of these wells. There are many reasons for well failure. See Finding of Fact 13. However, the cause was not the production well for the proposed project since it was not drilled until October of 1989. See Finding of Fact 6. The proposed project would not adversely affect the Harrington wells. See Finding of Fact 10.

Objector Tash has experienced loss of production due to water shortage. See Finding of Fact 15. However, Mr. Tash presented no evidence that the groundwater developments were causing his water shortages.

There is conclusive evidence in the record that the shallow aquifer is not adversely affected by withdrawing water from the lower aquifer, the source for this Application. There is evidence that the effects of withdrawing water from the lower aquifer would be minimal. See Findings of Fact 10 and 11. There is no evidence that water levels in the lower aquifer have declined. There is, in fact, evidence that water levels in the lower aquifer have remained relatively constant. Records kept on the Johnson test well indicate stable water levels with minor seasonal fluctuations. See Finding of Fact 8.

It is reasonable to conclude the drought conditions in the past few years are the reason for the acute shortage of water in the area. See Finding of Fact 19.

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 71925-41B is hereby granted to Ronald W. Johnson to appropriate groundwater at a point in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 33, Township 7 South, Range 9 West, Beaverhead County, by means of a well. The water shall be pumped at a rate not to exceed 1200 gallons per minute (gpm) up to 506 acre-feet per year for supplemental irrigation purposes on 209 acres from April 15 to September 15, inclusive of each year. The water shall be used on 10 acres in the S $\frac{1}{4}$ S $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 29, 153 acres in the NE $\frac{1}{4}$ and 31 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 32, and 15 acres in the W $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 33, all in Township 7 South, Range 9 West, in Beaverhead County.

A. This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any prior appropriator.

B. This permit is subject to § 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use. This well shall be constructed and maintained to prevent the contamination or pollution of groundwater. The well casing must not be

modified to allow the waters of Downing Spring to flow into the well. The final completion of this well must include an access port of at least .50 inch so the static water level in the well may be accurately measured.

C. The Permittee shall install an adequate flow metering device in the delivery line from the well to the sprinklers in order to allow the flow rate and volume of water diverted from the well to be recorded. The Permittee shall keep a written record of the flow rate and volume of all water diverted, including the period of time and shall submit said records to the Helena Water Resources Field Office upon demand and no later than November 30 of each year.

D. The Permittee shall take static water level measurements of the well on April 15 and November 15 of each year. The Permittee shall keep a written record of these measurements and submit them to the Helena Water Resources Field Office, 1520 E. 6th Ave., Helena, MT 59620-2301, upon demand and no later than November 30 of each year.

E. This permit is issued in conjunction with Water Use Permit No. 60490-41B. The combined appropriation as granted shall not exceed a total of 2400 gallons per minute up to 506 acre-feet per year.

F. This permit is issued in association with Water Right Claims No. W142919-41B, W142920-41B, W142922-41B, W142923-41B. The total amount of water diverted for this acreage shall not

exceed that amount which has been claimed and can be beneficially used.

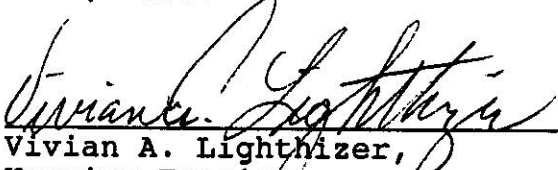
G. Issuance of this Permit shall not reduce the Permittee's liability for damages caused by the exercise of this Permit, nor does the Department, in issuing the Permit, acknowledge any liability for damages caused by the exercise hereof even if such damages are a necessary and unavoidable consequence of same.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 4th day of December, 1990.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 4th day of December, 1990 as follows:

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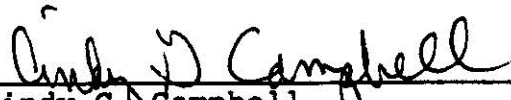
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